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Supreme Court, U.S.
FILED
FEB 27 2009
OFFICE OF THE CLERK

(5)

No. 08-945

IN THE
Supreme Court of the United States

EMPRESS CASINO JOLIET CORPORATION, ET AL.,

Petitioners,

v.

ALEXI GIANNOULIAS, ILLINOIS STATE TREASURER, ET AL.,

Respondents.

On Petition For A Writ Of Certiorari To The Supreme Court of Illinois

BRIEF FOR THE CATO INSTITUTE AS *AMICUS CURIAE* SUPPORTING PETITIONERS

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QUESTION PRESENTED

If the government robs Peter to pay Paul, does it violate the Takings Clause?

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BRIEF FOR THE CATO INSTITUTE AS *AMICUS CURIAE* SUPPORTING PETITIONERS

The Cato Institute respectfully submits that the petition for a writ of certiorari should be granted.*

INTEREST OF *AMICUS CURIAE*

The Cato Institute was established in 1977 as a nonpartisan public policy research foundation dedicated to advancing the principles of individual liberty, free markets, and limited government. Cato's Center for Constitutional Studies was established in 1989 to help restore the principles of limited constitutional government that are the foundation of liberty. Toward those ends, the Cato Institute publishes books and studies, conducts conferences and forums, publishes the annual *Cato Supreme Court Review*, and files amicus briefs with the courts. This case is of central concern to Cato because it addresses the further collapse of constitutional protections for private property, which lie at the very heart of the Fifth Amendment.

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* Pursuant to this Court's Rule 37.6, *amicus* states that this brief was not authored in whole or in part by counsel for any party, and that no person or entity other than the Cato Institute, its counsel, and its members made a monetary contribution to the preparation or submission of this brief. Letters consenting to the filing of this brief by all parties have been submitted to the Clerk.

INTRODUCTION AND SUMMARY OF ARGUMENT

The Illinois statute at issue takes money from the private owners of certain riverboat casinos—only disfavored Chicagoland casinos—and gives it to the private owners of horseracing tracks, without even a brief stopover in the State's treasury.

One Illinois legislator aptly referred to the statute as "rob[bing] Peter to pay Paul." *See* Mar. 29, 2006 Transcript of House Debate on H.B. 1917 (statement of Rep. Beiser). In French and Spanish, the idiom is more tangible: "undress one saint to dress another." http://en.wikipedia.org/wiki/Robbing_Peter_to_pay_Paul. The Chinese have a similar expression: "dismantle the east wall to patch up the west wall." *Ibid.* And so does this Court: "the sovereign may not take the property of *A* for the sole purpose of transferring it to another private party *B*." *Kelo* v. *City of New London, Conn.*, 545 U.S. 469, 477 (2005).

Under the Fifth Amendment, it matters not if it is Peter's money, the first saint's clothes, the east wall owner's stones, or *A*'s property. None of these things can be taken by the government unless for public use, and then only if just compensation is paid. That rule does not change simply because the property transferred is money, contrary to the Illinois Supreme Court's holding in this case. *See* Pet. 18-26.

The Fifth Amendment's protections are "designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *Armstrong* v. *United States*, 364 U.S. 40, 49

(1960). The Illinois statute, however, is far afield from any public use this Court has ever recognized. Such approved uses include: use by the government; use by the public; use by common carriers; and use to combat blight. The statute also lacks characteristics, such as naming only an unspecified class of beneficiaries and being part of a comprehensive plan aimed at achieving a public purpose, that would give this Court confidence that its enactment was not simply a pretext for the award of private benefits. *Kelo*, 545 U.S. at 487.

The State's naked extraction of funds from Peter (the casinos) to pay Paul (the racetracks) does not comport with the Fifth Amendment's protections, and permitting this statute to stand would only encourage similar efforts by federal, state, and local governments to redistribute money and other property from less-favored to more-favored private entities. This Court should grant review to ensure that protection of private property interests—whether in money, clothes, stones, or otherwise—remains as robust as the Fifth Amendment requires.

REASON FOR GRANTING THE PETITION: THE ILLINOIS STATUTE VIOLATES THE "PUBLIC USE" REQUIREMENT

As petitioners explain, review is warranted to correct the Illinois Supreme Court's erroneous conclusion that the Fifth Amendment's prohibitions on the uncompensated taking of "private property" are limited to the state's exercise of eminent domain and do not extend to the extraction of money. Pet. 18-26.

The forced transfer of tangible or intangible property (for example, real estate, fixtures, or trademarks) from the casinos to the racetracks would clearly be subject to constitutional challenge as an

uncompensated taking. *See, e.g.*, *Loretto* v. *Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 441 (1982) (affirming the "traditional rule that a permanent physical occupation of property is a taking"). The Illinois Supreme Court's exclusion of monetary exactions from takings challenges strips the Fifth Amendment's protections from a State's forced conveyance of a private party's cash having exactly the same practical impact as if the State had transferred an equivalent amount of other property.

The Illinois Supreme Court's decision also warrants review because the exaction here does not satisfy the "public use" requirement of the Takings Clause. *See* Pet. 28-29 & n.15. As petitioners explain, the Illinois statute's "award of benefits is so skewed to the advantage of private interests that it does not satisfy the Fifth Amendment's public use requirement." *Id.* at 28. The state supreme court, however, "never reached the 'public use' issue" because of its erroneous conclusion excluding monetary exactions from takings challenges. *Id.* at 8.

"[T]his Court has many times warned that one person's property may not be taken for the benefit of another private person without a justifying public purpose." *Thompson* v. *Consolidated Gas Utilities Corp.*, 300 U.S. 55, 80 (1937); *see also, e.g.*, *Hairston* v. *Danville & Western Ry. Co.*, 208 U.S. 598, 606 (1908) ("it is beyond the legislative power to take, against his will, the property of one and give it to another for what the court deems private uses"); *Missouri Pac. Ry. Co.* v. *Nebraska*, 164 U.S. 403, 417 (1896) ("The taking by a state of the private property of one person or corporation, without the owner's consent, for the private use of another, is not due process of law, and is a violation of the fourteenth

article of amendment of the constitution of the United States").

The public use requirement is one of the most ancient limitations on government power in this country. At the time of the Founding, this Court unequivocally explained that "a law that takes property from A. and gives it to B." would be "against all reason and justice." *Calder* v. *Bull*, 3 U.S. 386, 388 (1798). More than two centuries later, the Court reiterated that "the sovereign may not take the property of *A* for the sole purposes of transferring it to another private party *B*." *Kelo*, 545 U.S. at 477. The Illinois legislation runs smack into this time-honored prohibition.

The Court's public use jurisprudence has "wisely eschewed rigid formulas," *Kelo*, 545 U.S. at 483, recognizing that "what is a public use frequently and largely depends upon the acts and circumstances surrounding the particular subject-matter in regard to which the character of the use is questioned," *Fallbrook Irrigation Dist.* v. *Bradley*, 164 U.S. 112, 159-60 (1896). Although this jurisprudence reflects a general "policy of deference to legislative judgments in this field," *Kelo*, 545 U.S. at 480, whether a particular exaction meets the public use requirement is, ultimately, a judicial determination. *See, e.g., City of Cincinnati* v. *Vester*, 281 U.S. 439, 446 (1930); *Hairston*, 208 U.S. at 606.

The Illinois statute requires all casinos with adjusted gross receipts (AGR) above $200 million in 2004—in practice the four Chicago-area casinos—pay 3 percent of their AGR into the "Horse Racing Equity Trust Fund." 230 ILCS 10/7(a), Pet. App. 60a. This fund is a "non-appropriated trust fund held separate and apart from State moneys." 230 ILCS 5/54.5(a),

Pet. App. 57a. The fund is divided into two categories. Sixty percent of the proceeds are distributed to the racetracks as purses. 230 ILCS 5/54.5(b)(1), Pet. App. 57a-58a. The remaining 40 percent of the proceeds are distributed directly to the racetracks as an operating subsidy. 230 ILCS 5/54.5(b)(2)(B), Pet. App. 58a. The statute provides no meaningful restriction on the use of the subsidy, requiring only that it be used "to improve, maintain, market, and otherwise operate its racing facilities to conduct live racing, which shall include backstretch services and capital improvement related to live racing and the backstretch." 230 ILCS 5/54.5(b)(2)(B), Pet. App. 59a.

This statute does not remotely fit into or even resemble any of the general categories of permissible public uses recognized by this Court:

Property used by the government. It is well-settled that the government may take private property for its own use in carrying out its governmental functions. For example, after the Civil War, the Court upheld the federal government's condemnation of portions of the Gettysburg battlefield for placement of publicly owned monuments and tablets. *United States* v. *Gettysburg Elec. Ry. Co.*, 160 U.S. 668, 681-82 (1896). The Court declared that the government's taking of property for its own activities was presumptively public use. *Id.* at 680; *see also, e.g.*, *Old Dominion Land Co.* v. *United States*, 269 U.S. 55, 66 (1925) (upholding the exercise of eminent domain over land to be used for military purposes). The public character of governmental use of property is rarely in doubt: the government owns the property and occupies it to perform governmental func-

tions, which are presumptively for the benefit of the public.

Property used by the public. The government may take property to build highways, roads, public parks, and other public facilities to which the general public has a right of access. Indeed, this was the original conception of the term "public use"—that the general public was entitled to use, in a physical sense, the property in question. *See, e.g., Kelo*, 545 U.S. at 508-11 (Thomas, J., dissenting). This Court has upheld many takings of this kind. For example, in *Rindge Co.* v. *Los Angeles County*, 262 U.S. 700 (1923), the Court upheld as a public use the taking of land on a private ranch that was needed to construct a public road "as a way of convenience or necessity for public use and travel." *Id.* at 706; *see also United States ex rel. TVA* v. *Welch*, 327 U.S. 546, 551-52 (1946) (upholding condemnation of private property for transfer to the National Park Service as part of the Great Smoky Mountains National Park).

Property used by common carriers. The government may take private property for common carriers or companies operating under the legal obligations of common carriers to lay railroads, deploy power or cable TV lines, or provide other services to the public. *See, e.g., National R.R. Passenger Corp.* v. *Boston & Maine Corp.*, 503 U.S. 407 (1992) (taking of railroad track for use by Amtrak); *Mt. Vernon-Woodberry Cotton Duck Co.* v. *Ala. Interstate Power Co.*, 240 U.S. 30, 32 (1916) (taking of land and water rights by Alabama Interstate Power Company); *Head* v. *Amoskeag Mfg. Co.*, 113 U.S. 9, 19 (1885) (taking of upstream property flooded by grist mill "which grinds for all comers, at tolls fixed by law").

Property used to combat blight. The government may take property to clear blighted buildings or slums that create public health and safety hazards. In *Berman* v. *Parker*, 348 U.S. 26 (1954), the Court upheld the federal government's attempt to acquire and redevelop a blighted area in the District of Columbia, reasoning that the removal of blight was a "public use" because blighted property endangered the public welfare. Although the *Berman* Court permitted a non-blighted department store to be taken as part of the project, the Court emphasized that this was essential to achieving the public purpose of "eliminat[ing] the conditions that cause slums." 348 U.S. at 34.

The funds exacted from the casinos under the Illinois statute, however, are not used by the government, by the public, or by common carriers. Nor does their transfer remove blight or otherwise further the public welfare.

The statute does not even fall within the unprecedently broad understanding of the public use requirement supplied by this Court in *Kelo*, which permitted the exercise of eminent domain in furtherance of "economic development." 545 U.S. at 489-90. Importantly, although "the government's pursuit of a public purpose will often benefit individual private parties," *id.* at 485, the ultimate beneficiaries of the taking in *Kelo* were unknown, *id.* at 478 n.6 ("It is, of course, difficult to accuse the government of having taken *A*'s property to benefit the private interests of *B* when the identity of *B* was unknown"). And the taking was executed as part of an "integrated development plan." *Id.* at 487.

Although *amicus* continues to believe that *Kelo* was wrongly decided, the salient characteristics of

the government action there at least shared some similarities with other broadly defined "public uses" recognized by the Court. For example, in *Brown* v. *Legal Foundation of Washington*, 538 U.S. 216, 232 (2003), the Court found that funds taken from IOLTA accounts to provide legal services to "literally millions of needy Americans" qualifies as a public use. Similarly, in *Ruckelshaus* v. *Monsanto Co.*, 467 U.S. 986, 1015 (1984), the Court found that Congress may validly take proprietary data from applicants for registration to serve a "procompetitive purpose." In neither of these cases could the beneficiary of the taking be identified with particularity.

The Illinois statute, by contrast, lacks these characteristics and, to put it mildly, "raise[s] a suspicion that a private purpose is afoot." *Kelo*, 545 U.S. at 487. The statute simply transfers funds from one private entity to another—from the casinos to the racetracks—with minimal state involvement, and with little restriction on the use of the funds received. Moreover, the statute's private beneficiaries (the racetracks) are identified by the legislation, as are the private entities from whom the funds are to be taken (the casinos). And the statute hardly sets up a comprehensive plan for encouraging economic development in the Illinois horseracing industry, other than that the transferred funds themselves can be used to line the pockets of the current racetrack owners.

Although the Act purports to "address the negative impact riverboat gaming has had" on Illinois horseracing, Public Act 94-0804, § 1(5), Pet. App. 57a, the lack of meaningful restrictions on the use of funds creates an incentive for track operators to use the money to finance their ordinary expenses (or

some other parochial business purpose). Because the tracks are not obligated to undertake new projects or maintain pre-subsidy levels of investment or working capital in their operations, the subsidies could boost profits and go straight to the racetracks' bottom lines. The Illinois Racing Board monitors only the distribution of the funds, not how they are ultimately spent. 230 ILCS 5/54.5(c), Pet. App. 59a. Such outcomes do little, if anything, to meet the statute's purported goals.

The Fifth Amendment demands more than a mere legislative declaration that a particular exaction serves a public purpose. Although this Court grants some deference to legislative judgments, those judgments cannot stand if they are made "'without reasonable foundation.'" *Hawaii Housing Authority* v. *Midkiff*, 467 U.S. 229, 241 (1984) (quoting *Gettysburg Electric Ry. Co.*, 160 U.S. at 680). The taking of property "under the mere pretext of a public purpose, when its actual purpose was to bestow a private benefit," lacks such foundation. *Kelo*, 545 U.S. at 478.

The private-to-private transfer effected by this Illinois statute circumvents the standard political checks and balances associated with the burdens borne by private entities. "[N]othing opens the door to arbitrary action so effectively as to allow [public] officials to pick and choose only a few to whom they will apply legislation and thus to escape the political retribution that might be visited upon them if larger numbers were affected." *Railway Express Agency, Inc.* v. *New York*, 336 U.S. 106, 112-13 (1949); *see also County of Mobile* v. *Kimball*, 102 U.S. 691, 703 (1880) (distinguishing takings from taxation). These political checks also operate to minimize the types of

serious questions that have been raised about the involvement of private interests in the passage of the identical successor to Illinois statute at issue here. *See* Pet. 31.

* * *

When Paul is politically powerful or popular, the government will always have an incentive to pick Peter's pocket for Paul's private purposes. The Takings Clause—including its "public use" requirement—stands as a constitutional bulwark against such official extortion. *Monongahela Navigation Co.* v. *United States*, 148 U.S. 312, 325 (1893) ("it prevents the public from loading upon one individual more than his just share of the burdens of government"). Yet the decision below, if left uncorrected, would only encourage governments to exact funds from one private sector for the exclusive benefit of another—taking stones from the east wall to rebuild the west.

The national and world economies are experiencing a period of volatility that could lead to more government-mandated transfers of wealth. In such times, the stalwart defense of our constitutional liberties assumes even greater significance. *Pennsylvania Coal Co.* v. *Mahon*, 260 U.S. 393, 416 (1922) ("a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change") (citation omitted). Where, as here, no legitimate public use is furthered, robbing Peter to pay Paul violates the Takings Clause.

The Illinois Supreme Court's decision transgresses the economic liberties at the core of the Fifth Amendment, and that transgression should be reviewed and corrected by the Court.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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February 27, 2009